Fairus Nizam bin Shueb v Public Prosecutor

HIGH COURT (IPOH) — CRIMINAL APPEAL NO 42–3 OF 2000
PS GILL J
4 OCTOBER 2000

Criminal Law *— Attempted robbery — Uncorroborated evidence of witnesses — Whether charge proved — Penal Code s 394*

Criminal Procedure *— Judge — Role of trial judge — Acquittal and reduction of charges — Judge must still evaluate evidence and cite reasons for accepting or rejecting accused's evidence — Whether judge could convict on uncorroborated evidence*

The appellant was charged under s 394 of the Penal Code for voluntarily causing hurt to the victim whilst attempting to commit robbery, and under s 326 of the Penal Code for voluntarily causing grievous hurt with a knife. The victim did not lodge any police report and this was used by the defence counsel to attack the victim's credibility and the lack of corroborative evidence. The sessions court judge reduced the second charge from an offence under s 326 to one under s 325 of the Penal Code and convicted the appellant under s 325. The appellant was sentenced to 18 months imprisonment. The appellant cross appealed against his conviction and sentence under s 325 and the deputy prosecutor appealed against the acquittal under s 394 of the Penal Code and the amendment of the charge under s 326.

Held, allowing the deputy prosecutor's appeal against acquittal under s 394 of the Penal Code and dismissing the cross appeal by the appellant:

(1) It was a little disquieting that the sessions court judge did not take pains to analyze the evidence of the appellant against that of the prosecution, even if he was minded to acquit the appellant on the charge of s 394 of the Penal Code, and to further reduce the charge of s 326 to s 325 of the Penal Code. It is incumbent for trial judges and magistrates alike to evaluate the evidence and to further cite their reasons for accepting or rejecting the evidence of the appellant, the victim or any other witness (see p 229E–F).

(2) There is no mandatory requirement for any corroboration of a witness's evidence in criminal trials of this nature. Even where corroboration is normally required, so long as it is clear the trial judge has in mind the risk of convicting on uncorroborated testimony, but nevertheless decides to do so, because he is convinced of the truth of the victim's evidence, such conviction is not illegal (see p 230G–H).

(3) There was sufficient evidence to establish beyond reasonable doubt a conviction under s 394 of the Penal Code. There was an attempted robbery although nothing was taken from the victim. An attempt is an act done in part execution of a criminal design amounting to more than the preparation but falling short of actual consummation, and possessing except for failure to consummate, all the elements of the substantive crime. In other words, an attempt consists in the intent to commit a crime, combined with the doing of some act, but falling short of, its actual commission (see p 231B–D).

(4) The sentence was increased from 18 months imprisonment to five years imprisonment as the act of the appellant against the victim was a dastardly crime which caused permanent injuries/scarring to the victim's countenance, and it was time for courts to reflect the approbrium of reasonable thinking society towards such crimes (see pp 231G, 231I–232A).

[**Bahasa Malaysia summary**

Perayu dituduh di bawah s 394 Kanun Keseksaan kerana telah menyebabkan kecederaan kepada mangsa dengan sengaja sementara membuat percubaan untuk melakukan rompakan, dan di bawah s 326 Kanun Keseksaan kerana telah menyebabkan kecederaan parah dengan sebilah pisau. Mangsa tidak membuat laporan polis dan ini digunakan oleh peguambela untuk menyerang kebolehpercayaan mangsa tersebut serta kekurangan keterangan menyokong (corroboration). Hakim mahkamah sesyen telah mengurangkan pertuduhan kedua daripada kesalahan di bawah s 326 kepada kesalahan di bawah s 325 Kanun Keseksaan, dan telah mensabit perayu di bawah s 325. Perayu dikenakan hukuman penjara selama 18 bulan. Perayu telah merayu-balas terhadap sabitannya dan hukumannya di bawah s 325, dan timbalan pendakwa raya merayu terhadap pembebasan perayu di bawah s 394 Kanun Keseksaan, serta terhadap pindaan pertuduhan di bawah s 326.

Diputuskan, membenarkan rayuan timbalan pendakwa raya terhadap pembebasan di bawah s 394 Kanun Keseksaan dan menolak rayuan-balas perayu:

(1) Adalah membimbangkan bahawa hakim mahkamah sesyen tidak menganalisiskan keterangan pihak perayu terhadap keterangan pihak pendakwa walaupun beliau mempertimbangkan pembebasan perayu di bawah pertuduhan s 394 Kanun Keseksaan, dan pengurangan pertuduhan daripada s 326 kepada s 325 Kanun Keseksaan. Adalah kewajipan hakim dan majistret unruk membuat penilaian keterangan dan memberi alasan-alasan mereka ketika menerima ataupun menolak keterangan pihak perayu, mangsa atau saksi (lihat ms 229E–F).

(2) Tidak terdapat keperluan mandatori bahawa keterangan saksi perlu disokong di dalam kes-kes jenayah sebegini. Walaupun adalah kebiasaan bahawa sokongan diperlukan, selagi hakim telah mempertimbangkan risiko mensabit di atas keterangan yang tidak disokong tetapi masih terus berbuat demikian kerana beliau yakin pada kebenaran keterangan mangsa, sabitan sebegitu tidak menyalahi undang-undang (lihat ms 230G–H).

(3) Terdapat keterangan yang mencukupi untuk menentukan satu sabitan melampaui keraguan yang munasabah di bawah s 394 Kanun Keseksaan. Terdapat suatu percubaan merompak walaupun tiada apa-apa yang telah diambil daripada mangsa. Percubaan merupakan sebahagian daripada perlaksanaan berniat jenayah yang merupakan lebih daripada persediaan tetapi tidak sampai penyempurnaan sebenarnya, dan mengandungi, selain daripada kegagalan penyempurnaan, semua unsur suatu kesalahan. Dalam erti kata yang lain, suatu percubaan merangkupi niat untuk melakukan kesalahan, serta melakukan sebahagian daripada perbuatan tersebut, tetapi tidak melakukan perbuatan sebenarnya (lihat ms 231B–D).

(4) Hukuman telah ditambah dari 18 bulan ke lima tahun, memandangkan kesalahan perayu terhadap mangsa adalah perbuatan pengecut yang menyebabkan kecederaan yang kekal/meninggalkan parut di wajah mangsa, dan telah tiba masa untuk mahkamah mengimbaskan pemikiran munasabah masyarakat terhadap jenayah-jenayah sedemikian (lihat ms 231G, 231I–232A).]

Notes

For a case on s 394 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2000 Reissue) para 1436.

For cases on role of a trial judge, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1591–1593.

Cases referred to

Amrita Bazar Patrika Press Ltd (1919) 47 Cal 190 (refd)
Arumugam s/o Muthusamy v PP [1998] 3 MLJ 73 (refd)
Augustine v PP [1964] MLJ 7 (refd)
Murugiah v PP [1941] MLJ 17 (refd)
R v Turnbull & Ors [1976] 3 All ER 549 (refd)
Sultan Mohamed v Regina [1952] MLJ 186 (refd)
Vijayaratnam v PP [1962] MLJ 106 (refd)

Legislation referred to

Penal Code ss 325, 326, 394

Abd Aziz bin Mohd Ali (Attorney General's Chambers) for the appellant.
Elangovan (*Kula & Associates*) for the appellant in the cross appeal.

PS Gill J. : Fairus Nizam bin Shueb was charged in the sessions court Teluk Intan on the following charges:

> Pertuduhan Pertama:
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> Bahawa kamu pada 26 July 1999 jam sekitar 10.25pm, di bahagian Bangunan May Bank, Jalan Ah Cheong, Teluk Intan, di dalam Daerah Hilir Perak, di Negeri Perak cuba melakukan rompakan ke atas Tan Leong Huat KPT: 690517-08-6005, dan dengan sengaja telah menyebabkan cedera ke atas orang tersebut iaitu cedera di bahagian hidung dan lengan tangan sebelah kiri dengan menggunakan sebilah pisau. Dengan itu telah melakukan kesalahan di bawah s 394 Kanun Keseksaan dan boleh dihukum di bawah peruntukan yang sama.
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> Pertuduhan Kedua:
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> Bahawa kamu pada 26 July 1999 lebih kurang pukul 10.25pm, di kawasan hadapan Bangunan Maybank, Jalan Ah Cheong Teluk Intan, di Daerah Hilir Perak, dalam Negeri Perak, telah sengaja menyebabkan cedera parah ke atas Tan Leong Huat KPT: 690517-08-6005 dengan menggunakan pisau iaitu satu alat untuk memotong, oleh itu kamu telah melakukan kesalahan di bawah s 326 Kanun Keseksaan dan boleh dihukum di bawah peruntukan yang sama.

The appellant claimed trial and at the conclusion of his trial he was found guilty of an offence under s 325 of the Penal Code. Incidentally the learned sessions court judge had reduced the second charge from an offence under s 326 to one under s 325 Penal Code. A sentence of 18 months imprisonment was imposed by the learned sessions court judge in respect of the offence under s 325 of the Penal Code. A cross appeal was lodged by the appellant against his conviction and sentence under s 325 of the Penal Code.

An appeal was lodged by the learned deputy prosecutor against the acquittal of the appellant under s 394, and also the amendment of the charge by the learned sessions court judge in respect of the charge under s 326 Penal Code.

On the facts, the narrative of events was as follows:

The victim (PW4) and his wife (PW5) had, on 26 July 1999, at 10.20pm, gone to an automatic teller machine along Jalan Ah Cheong in Teluk Intan, in order to withdraw some money. The victim's wife had apparently gone down from the car, in order to go towards the cash machine, and left the victim in the stationary car to attend to their daughter. It was at this point of time that the appellant had got into the car from the rear left back door. The startled victim then asked him what he wanted to which the appellant allegedly said 'Diam saya nak samun'. The victim noticed that the appellant was holding a knife about five to six inches long. On seeing the knife, the victim panicked and tried to wrest it from the appellant. A scuffle ensued between the victim and the appellant.

The victim maintained that he was able to identify the appellant, as the head lights of the car, and the interior lights of the car, were on at that point of time. The streets lights were also on at that point of time. The appellant had a sort of hat on when he entered the car but in the ensuing scuffle the

hat dropped off. The appellant stopped scuffling with the victim when the victim's wife, who on seeing this scuffle, rushed towards the car, and opened the door. As a result of this incident the victim suffered permanent scarring to his nose, and lacerations above his eyebrow and mouth. A

In the cross examination that ensued, the victim was repeatedly asked whether the appellant had merely got into the car to ask the victim for a lift, and that it was not for the purpose of wanting to rob the victim. The victim was adamant that the appellant had pointedly told him 'Diam, saya nak samun'. The victim denied that he had got the wrong impression, or that he had misheard what the appellant had said on entering the car. B

The victim's wife — PW5 in her evidence corroborated in the main, the evidence of the complainant, in that she witnessed a scuffle between her husband and a person. She apparently rushed to the car, and opened the door. On seeing her, the accused, as it so happens, alighted from the car from another door. She screamed for help and at that point of time two policeman who were in the vicinity, managed to apprehend the appellant. One of the policeman on duty and responsible for the arrest of the appellant, was called as a witness, and he basically confirmed the version of PW5, the victim's wife. C D

There was an attempt by the defence counsel to attack the question of identification of the appellant at the material time. It was the defence counsel's argument that since the entire incident took place over a short span of period, and at night, with the appellant allegedly having a hat on his head, it would be unsafe to accept the identification of the appellant by the victim. I have considered the guidelines in *R v Turnbull & Ors* [1976] 3 All ER 549. I do not propose to reproduce them. The guidelines in *R v Turnbull* deals with directions to juries. In a summary trial such as this, the learned sessions court judge assumes the functions of the judge and jury. E F

In this instant case, the facts and circumstances are different as there was identification by both the victim and his wife. On a point of law, an identification by one witness can constitute support for the identification by another, provided the trial judge warns himself that even honest witnesses can make mistakes. In the present case, even though the learned sessions court judge had not warned himself in such terms, the quality of identification was good. This is borne out by the evidence of the victim and his wife and the arresting officer, who apprehended the appellant who was trying to run away from the scene of the crime. G

The only fault of the learned sessions court judge was in the administration of the caution as propounded by *R v Turnbull* (at p 554). H

In this instant case, it would have been infinitely better, if there had been an identification parade, but having regard to the cumulative effect of the evidence as a whole, I see no failure of justice having occasioned, nor do I see any ground for disturbing the conviction purely on the basis that no identification parade was held. I

I find support in my view from the decision of the Federal Court in *Arumugam s/o Muthusamy v PP* [1998] 3 MLJ 73, wherein his Lordship

Chong Siew Fai CJ (as he then was) had this to say about identification evidence:

> Identification of an accused for the first time in court at the trial is undesirable and it would be a good practice to hold an identification parade. However, to hold that an identification parade must, in all circumstances, be conducted in order to sustain a conviction would be too stringent. It would, therefore, depend on the particular facts and circumstances of each case whether to hold such a parade.

In his defence, the appellant stated that he was stranded, having missed the last bus to his kampung, and on seeing the victim's car parked with the victim in it, and assuming that the victim was a Malay man, got into the car and inquired whether the victim would drop him off at his kampung in Batu 3. The victim apparently become abusive and hit him on his face. The appellant equally struck back at the victim. The appellant denied having used any weapon on the victim and denied having knowledge, or causing injury to the victim's nose. When questioned about the nose injury, the appellant answered that it might have been caused by the ring that he (appellant) wore on his finger. The caution statement of the appellant taken two days after his arrest was tendered, and it was consistent with his version in evidence.

The learned sessions court judge had disregarded the defence of the appellant. This treatment of the defence case is found on pp 20–23 of the grounds of judgment.

It is a little disquieting that the learned session court judge did not take pains to analyze the evidence of the appellant against that of the prosecution, even if he was minded to acquit the appellant on the charge of s 394 Penal Code and to further reduce the charge of s 326 to s 325 of the Penal Code. It is incumbent for trial judges and magistrates alike to evaluate the evidence and to further cite their reasons for accepting or rejecting the evidence of the appellant, the victim or any other witness. I am not alone in my views on this.

In the decision of Horne J in *Murugiah v PP* [1941] MLJ 17, it was held:

> In giving his 'grounds of decision' under s 307(iii) of the Criminal Procedure Code (Cap 6), a magistrate should state, except in the simplest of cases, the reasons why he believed or disbelieved the evidence given on behalf of the prosecution or of the accused, and not merely 'I believe the evidence of the accused'.
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> In a case of theft it is not necessary for an accused to convince of its truth.

In *Augustine v PP* [1964] MLJ 7, Ong J in his judgment had held:

> Except in the most straightforward type of cases, where the facts clearly establish all the necessary ingredients of an offence, it is the duty of the magistrate to state at least what were his finding of fact.

Vijayaratnam v PP [1962] MLJ 106 Hashim J had held that:

> A magistrate or president of the sessions court in rejecting the accused's defence should show in his grounds of judgment that the defence had been

> carefully considered and give his reasons for rejecting it and not merely say that he accepted the evidence of the police witnesses.

Further in *Sultan Mohamed v Regina* [1952] MLJ 186, Brown J had this to say:

> The magistrate ought to show in his grounds of judgment that the defence has been carefully considered and his reasons for rejecting it.

I cannot further stress the importance for session court judges and magistrates to take heed of these cases and to abide by them. Their judgments should be 'speaking judgments', and not just a regurgitation of facts and an abrupt finding.

It thus behoves on me now to evaluate the evidence in the present instance. The defence of the appellant was far fetched to say the least. The evidence of the victim despite the scrutiny of cross examination was that the appellant had pointedly said 'Diam saya nak samun'. The fact that the knife allegedly used was not recovered is not fatal, as there were injuries sustained by the victim, and the medical officer's testimony (PW1) bears evidence of the fact, that a sharp object like a knife, or blade was used. The fact that the appellant's caution statement recorded two days after the incident was tendered, only goes so far to corroborate his defence, but it does not detract from the overwhelming evidence of the prosecution. In a criminal trial, provided the judge is satisfied beyond reasonable doubt of the guilt of the appellant, a conviction may be based on the testimony of a single prosecution witness, who swears he saw the appellant commit the crime in question, and this remains the case irrespective of whether part, or even all of his evidence is contradicted, by the testimony of one or more witnesses called by the defence.

The fact that there was no police report lodged by the victim (PW4), was subject to much attack by the defence counsel, on the credibility of the victim's version of events, and the lack of corroborative evidence. With respect, the lack of a police report by the victim does not in anyway vitiate his evidence in the present instance, as his evidence was corroborated by the evidence of his wife, PW5.

Further, there is no mandatory requirement for any corroboration of a witness's evidence in criminal trials of this nature. Even where corroboration is normally required as a rule of prudence, ie accomplice evidence, or adults in sexual cases, so long as it is clear the trial judge had in mind the risk of convicting on uncorroborated testimony, but nevertheless decided to do so, because he was convinced of the truth of the victim's evidence, such conviction is not illegal. Similarly in this instance, there is no rule of law that the victim's evidence should be corroborated, and as long as the learned sessions judge accepted the truth of his evidence, it is enough.

I have my reservations on the preferment of charges against the appellant. The appellant was charged for an offence under s 394, and additionally under s 326 on the same set of facts. Judging from the facts, in essence, it was while attempting to commit the robbery that the appellant

voluntarily caused injury to the victim. This constitutes one single offence, under s 394 Penal Code and not two different offences, as the evidence necessary, to support a conviction on the first offence, was substantially the same as the second offence. Section 394 postulates and contemplates the causing of hurt during the commission of the robbery, when such causing of hurt is hardly necessary to facilitate the commission of robbery — *Ratanlal and Dhirajlal's Law of Crimes*. The charge under s 326 of the Penal Code was thus needless. I cannot fathom why the learned sessions court judge had held that there was insufficient evidence on a charge of an attempt to commit robbery under s 394, as there was overwhelming evidence to that effect. The learned sessions court judge's reasoning that just because nothing was taken from the victim, and as such there was no robbery, is fallacious to say the least. The learned sessions court judge further held that the acts of the appellant did not constitute even an attempt. I beg to differ. An attempt is an act done in part execution of a criminal design amounting to more then the preparation but falling short of actual consummation, and possessing, except for failure to consummate, all the elements of the substantive crime. In other words an attempt consists of the intent to commit a crime combined with the doing of some act, but falling short of its actual commission. It may consequently be defined as that which if not prevented would have resulted in the full commission of the act attempted. See *Amrita Bazar Patrika Press Ltd* (1919) 47 Cal 190.

In our present instance, if not for the victim having the courage to wrest the knife from the appellant's hand, and the timely arrival of the victim's wife at the scene, the crime of robbery would have been completed.

The learned session court judge's reduction of the charge from s 326 to s 325 of the Penal Code was equally erroneous. To my mind there was sufficient evidence to establish beyond reasonable doubt a conviction under s 394 Penal Code. For those reasons, I allowed the appeal of the learned deputy public prosecutor and convicted the appellant under 394 of the Penal Code. The appellant appeal against the conviction of the learned session court judge under s 325 Penal Code was dismissed.

Sentence

The act of the appellant against the victim was a dastardly crime, especially as he had caused permanent injuries/scarring to the victim's countenance. Robberies are rampant these days, and the time has come for the courts to reflect the opprobrium of a reasonable thinking society towards such crimes. It is a traumatic invasion to one's property and person and creates a sense of insecurity to a person, particularly the victims and their families. A leisurely trip to town in this present instance has turned out to be a nightmarish experience, which would leave an indelible mark in the lives of the victim, his wife and child who witnessed the incident. It was a wanton act on the part of the appellant and deserves the weight of the law. I would be failing in my duties if I did not take a serious view of such an offence. The sentence passed on the appellant by the learned sessions court judge of 18 months imprisonment under s 325 of the

Penal Code is set aside, and the appellant is sentence to five years imprisonment from today.

Prosecution's appeal against acquittal under s 394 of the Penal Code allowed. Cross appeal by appellant dismissed.

Reported by Moy Saw Han